APPENDIX A

(Federal Trade Commission Docket 6893)

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15541

THEODORE KAGEN CORP., a corporation, *et al.*,
PETITIONERS

v.

FEDERAL TRADE COMMISSION, RESPONDENT

On Petition to Review an Order of the
Federal Trade Commission

Decided September 29, 1960

Mr. Alvin D. Edelson, with whom *Mr. Ben Paul Noble* was on the brief, for petitioners.

Mr. Miles J. Brown, Attorney, Federal Trade Commission, with whom *Mr. Alan B. Hobbes*, Assistant General Counsel, Federal Trade Commission, was on the brief, for respondent. *Mr. E. K. Elkins*, Attorney, Federal Trade Commission, also entered an appearance for respondent.

Before EDGERTON, DANAHER, and BASTIAN, *Circuit Judges*.

PER CURIAM: Oral testimony together with exhibits convinced the Commission that base-metal bezels of petitioners' watch cases could be mistaken for precious metals, because of their appearance, in the absence of clear disclosure to the contrary. Substantial evidence supports this finding. The Commission ordered petitioners to cease "Offering for sale or selling watch cases composed in whole or in part of base metal which has been treated to

simulate precious metal, without clearly disclosing on such cases the true metal composition of such treated cases or parts." Commission counsel advised us in oral argument, in response to a question from the bench that the order may be interpreted to require no more detailed disclosure than that the treated cases or parts are composed of base metal. As so interpreted, the order is

Affirmed.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15,541

September Term, 1960

THEODORE KAGEN CORP., a corporation, et al., *Petitioners,*

v.

FEDERAL TRADE COMMISSION, *Respondent.*

On Petition to Review an Order of the Federal Trade Commission.

Before: Edgerton, Danaher and Bastian, Circuit Judges.

Judgment

This case came on to be heard on the record from the Federal Trade Commission, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is ordered and adjudged by this court that the order of the Federal Trade Commission on review in this case is affirmed.

It is FURTHER ORDERED by the court, pursuant to Rule 38(b), that the respondent within ten days submit a proposed enforcement degree in conformity with the opinion of this court.

Per Curiam.

Dated: September 29, 1960.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15,541

September Term, 1960

THEODORE KAGEN CORP., *a corporation*, etc., et al.,
Petitioners,

v.

FEDERAL TRADE COMMISSION, *Respondent*.

Before: Edgerton, Danaher and Bastian, Circuit Judges, in Chambers.

Final Decree Enforcing Order to Cease and Desist

Petitioners herein having filed in this Court on January 29, 1960, a petition to review and set aside an order to cease and desist issued against them on November 19, 1959, by the Federal Trade Commission, respondent herein, in a proceeding before it entitled "In the Matter of *Theodore Kagen Corp.*, a corporation, and *Theodore Kagen*, individually and as an officer of Theodore Kagen Corp., and doing business as T. K. Co., Docket No. 6893;" and a copy of said petition having been served upon respondent and respondent having thereafter certified and filed herein, as required by the Federal Trade Commission Act, a transcript of the entire record in said proceeding; and the matter having been heard by this Court on briefs and oral argument on September 19, 1960, and this Court having thereafter fully considered the cause and having rendered its decision on September 29, 1960, affirming said order, as interpreted in said decision:

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED, by this Court that the aforesaid petition to review and set aside the order of the Federal Trade Commission be, and it hereby is, denied; and

IT IS HEREBY FURTHER ORDERED, ADJUDGED AND DECREED that the order to cease and desist, as heretofore affirmed, be, and it hereby is, enforced, and that petitioners be, and they hereby are, ordered to obey and comply with the terms of the aforesaid order.

Without prejudice to the right of the United States, as provided in Section 5(1) of the Federal Trade Commission Act, to prosecute suits to recover civil penalties for violation of the aforesaid order to cease and desist, hereby enforced, this Court retains jurisdiction of this cause to enter such further orders herein from time to time as may become necessary effectively to enforce compliance in every respect with this decree and to prevent evasion thereof.

By the Court:

United States Circuit Judges

Entered: October 27, 1960.

APPENDIX D

SUPREME COURT OF THE UNITED STATES
October Term, 1960

No. .....

THEODORE KAGEN, a corporation et al., *Petitioner*

v.

FEDERAL TRADE COMMISSION

Order Extending Time to File Petition for Writ of Certiorari

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including January 30, 1961.

/s/ WILLIAM J. BRENNAN, JR.
Associate Justice of the Supreme
Court of the United States

Dated this 27th day of December, 1960.

APPENDIX E

Statutes Involved

Federal Trade Commission Act

The pertinent provisions of the Federal Trade Commission Act; 38 Stat. 717, as amended; 52 Stat. 111; 66 Stat. 632; 15 U.S.C.A. 41-58.

Sec. 5 (a) (1)

15 U.S.C.A. 45 (a) (1)

Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce are hereby declared unlawful.

Sec. 5 (a) (6)

15 U.S.C.A. 45 (a) (6)

The Commission is hereby empowered and directed to prevent . . . from using any unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.

Sec. 5 (c)

15 U.S.C.A. 45 (c)

Any person, partnership or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the Court of Appeals of the United States within any Circuit where the method of competition or the act or practice in question was used or where such person . . . resides or carried on business, by filing with the Court, within sixty days of service of such order, a written petition praying that the order of the Commission be set aside . . . Upon such filing of the petition, the Court shall have jurisdiction of the proceedings and of the questions determined therein concurrently with the Commission until the filing of the record and shall have power to make and enter a decree affirming, modifying or

setting aside the order of the Commission, . . . the findings of the Commission as to the facts, if supported by evidence, shall be conclusive . . . The judgment and decree of the Court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari, as provided in section 240 of the Judicial Code.

Sec. 5 (d)

15 U.S.C. 45 (d)

Upon filing of the record with it, the jurisdiction of the court of appeals of the United States to affirm, enforce, modify, or set aside orders of the Commission shall be exclusive.

Sec. 5 (e)

15 U.S.CA 45 (e)

Such proceedings in the court of appeals shall be given precedence over other cases pending therein . . .

Sec. 9 (par. 4)

15 U.S.C.A. 49

Upon the application of the Attorney General of the United States, at the request of the commission, the district courts of the United States shall have jurisdiction to issue writs of mandamus commanding any person or corporation to comply with the provisions of sections 41-46 and 47-58 of this title or any order of the commission made in pursuance thereof.

APPENDIX F

(1) *Base Metal Cases Simulating Precious Metal:* In respect of watch cases composed wholly of base metal manufactured or otherwise processed to simulate or have the appearance of precious metal, and cases composed of an alloy containing gold or less than 10 karat fineness, the mark shall show that said case is base metal, as for example—

Base Metal

or

Stainless Steel

or

Nickel

or

Nickel Plated

or

Chromium

or

Chr. Plated Steel

or

Brass

(m) *Cases Having a Combination of Different Metals:* In respect of watch cases having a back and bezel composed, respectively, of a different kind or quality of metal, the disclosure for marking provided for in the foregoing provisions of this Rule shall be made in the manner indicated therein with respect to each such respective parts, as for example—

Base Metal Back

14K Gold Filled Bezel

[To be shown together or at one place on the case]

When two or more parts of the case do not have the appearance of being made of the same quality or kind of metal, as for example, when the bezel of such a case is of gold filled quality and the back is stainless steel, the marking used under this paragraph (m) may be separated as illustrated in the following:

Stainless Steel

[Placed on the back]

14K Gold Filled

[Placed on the bezel]

In the separation of marks here specified such sufficient care must be exercised as will avoid possibilities of deception or confusion.

(n) *Marking of Minimum Quality in Lieu of Multiple Stamping:* In respect of watch cases in which the case itself has parts composed of gold alloy of different fineness or quality, or has parts which are plated or coated with different thickness of plating or electroplating as specified in paragraphs (b), (c), (c-1), (d), and (d-1) above, such watch case may be marked with the quality and fineness of the lowest grade as an optional method in lieu of marking each such different piece or part, as for example, the mark of "12K Rolled Gold Plate" for a case which is composed entirely of such 12 karat rolled gold plate with the exception of the bezel which is of a higher quality, such as "14K Gold Filled." In no instance, however, shall this optional form of marking be utilized in such manner or under such conditions as may be deceptive or misleading to the public.

(In the application of this Rule platings or electroplatings which are of less than 1½/1000 of an inch thickness on base metal shall be deemed base metal. If such plating or electroplating is of an alloy containing less than the equivalent of 10 karats of gold, the part of the case so constructed shall also be deemed base metal. If either such plating or electroplating is on a stock of precious metal, as for example, "Sterling Silver," the part of the case so constructed shall be known by the name of the metal in the stock, such as in the example given, "Sterling Silver.")

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JAMES R. BROWNING, CL

No. 684

In the Supreme Court of the United States

OCTOBER TERM, 1960

THEODORE KAGEN CORP., ET AL., PETITIONERS

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

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BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 1a-2a) is reported at 283 F. 2d 371. The opinion and order of the Federal Trade Commission (J.A. 98-104)[1] have not yet been reported.

JURISDICTION

The judgment of the court of appeals was entered on October 27, 1960 (Pet. 4a). The time for peti-

[1] "J.A." refers to the Joint Appendix in the court of appeals.

tioning was extended on December 27, 1960 by Mr. Justice Brennan to January 30, 1961 (Pet. 5a), and the petition for a writ of certiorari was filed on the latter date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Petitioners are engaged in the sale of watchcases to watchmakers and to wholesalers of watchmakers' supplies. Some of their cases, marked only with the phrase "stainless steel back," are composed of stainless steel backs and of front pieces, known as "bezels," resembling gold or silver but made from treated base metal. The Federal Trade Commission ordered petitioners to cease and desist from selling cases "composed in whole or in part of base metal which has been treated to simulate precious metal without clearly disclosing on such cases the true metal composition of such treated cases or parts." The questions presented are as follows:

1. Whether there was substantial evidence to support the Commission's finding that petitioners' practice has a tendency and capacity to deceive a substantial portion of the purchasing public.

2. Whether a cease-and-desist order was proper notwithstanding the alleged consistency of petitioners' conduct with the Commission's Trade Practice Rules and with industry-wide custom, and notwithstanding the Commission's previous failure to enjoin similar conduct of another manufacturer.

STATEMENT

Petitioners, a corporation and its president, are engaged in the sale of watchcases to watchmakers and to wholesalers of watchmakers' supplies (J.A. 2, 7, 9, 92). Many of petitioners' watchcases are two-piece cases, the essential pieces being the back and the bezel (J.A. 96, 99). A bezel is the grooved rim or flange which holds a watch crystal. It is a prominent component of a watchcase and of the finished watch (J.A. 101); when the watch is worn, the bezel is the primary metallic portion of the watchcase that is visible.

The bezels of petitioners' watchcases are made of gold-colored anodized aluminum, chrome-plated steel or stainless steel (J.A. 23, 26, 45, 47, 49-50, 63-64, 68, 79, 80-85, 87). None of these watchcases contain gold or silver.[2] The backs of all are made of stainless steel (J.A. 3, 7, 79-82, 84-88). When these stainless steel backs are incorporated into watchcases with bezels that are of gold-colored anodized aluminum or silver-colored chrome plate, they are marked with the legend "stainless steel back" (J.A. 3, 7, 9, 14, 18, 26, 45, 47, 63-64, 79, 80, 81, 83-88). There are no other marks on these

---

[2] Commission witness Jedlicka, a spectro-chemist, testified that petitioners' bezels were made of "aluminum with a very very thin overlay of some material which has a very faint trace of gold" (J.A. 31, 36), and that the "total value of the gold couldn't possibly be more than just a few pennies" (J.A. 37). Petitioner Kagen, on the other hand, categorically denied that the anodized aluminum parts of petitioners' watchcases contained any gold whatsoever (J.A. 82, 83, 87, 88).

cases to indicate the metallic content of the bezels themselves (J.A. 15, 18, 23, 24, 28, 64, 90).

Other manufacturers' watchcases with stainless steel backs and bezels made of rolled gold plate, gold fill, or gold electroplate are marked on the back with the legend "stainless steel back" (J.A. 54, 59, 61, 77).

Petitioners also sell certain watchcases whose bezels as well as backs are composed of, and have the appearance of, stainless steel (J.A. 49, 64, 80, 84, 85). The backs of these cases are stamped with the legend "all stainless steel case" (J.A. 49, 80, 84).

In Commission proceedings on a complaint under Section 5 of the Federal Trade Commission Act, expert testimony was received before an examiner that only an expert could distinguish on sight between gold and anodized aluminum bezels (J.A. 28, 65-66, 83); that even an expert may be unable so to differentiate (J.A. 10-16, 26); that gold is a more serviceable and longer-lasting watchcase material than base metal, and therefore more desirable (J.A. 25-26); and that petitioners' watchcases were not marked in such a manner as to identify the base-metal composition of the apparently gold bezels (J.A. 99, 101). The examiner concluded (J.A. 96-98) that the "sale and distribution of watch cases having bezels made of a base metal which has been so treated as to have the appearance of a precious metal, without disclosing the actual composition of such bezels, clearly has the tendency and capacity to mislead the purchasing public as to the content of the bezels"; and that petitioners were engaged in unfair and deceptive acts and practices and unfair methods of competition in interstate

commerce. He proposed a cease-and-desist order (J.A. 97-98). On appeal, the Commission adopted the initial decision as its own (J.A. 99-104), and issued the examiner's proposed order directing petitioners to cease and desist from:

> Offering for sale or selling watch cases composed in whole or in part of base metal which has been treated to simulate precious metal, without clearly disclosing on such cases the true metal composition of such treated cases or parts. [J.A. 97-98]

The court of appeals, interpreting the order to permit compliance by identification of the treated watch cases as composed of "base metal," affirmed *per curiam* (Pet. 2a).

ARGUMENT

1. While petitioners admit that a finding of tendency and capacity to deceive members of the public (as distinguished from actual deception) is sufficient to support a cease-and-desist order (Pet. 18), they argue that the Commission finding of such tendency and capacity is not supported by substantial evidence. This Court recently pointed out, however, that "substantiality of evidence on the record as a whole to support agency findings 'is a question which Congress has placed in the keeping of the Courts of Appeals.'" *Federal Trade Commission* v. *Standard Oil Co.*, 355 U.S. 396, 401. The court of appeals here found that "[s]ubstantial evidence supports [the] finding" of the Commission that "base-metal bezels of petitioners' watch cases could be mistaken for precious metals, because of their appear-

ance, in the absence of clear disclosure to the contrary" (Pet. 1a). Petitioners make no claim that the court below did not apply the proper standard in testing the sufficiency of the supporting evidence.

2. Petitioners also rely on their alleged adherence to the Commission's Trade Practice Conference Rules for the Watch Case Industry, 16 C.F.R. 174.2(b), and to general trade practice. But, as they again admit (Pet. 17), the widespread nature of an illegal practice is no defense to a charge of unfair competition. *Federal Trade Commission* v. *Winsted Hosiery Co.*, 258 U.S. 483. And the cases make clear that the Trade Practice Rules, which on their face (see Pet. 7a-9a) appear to preclude petitioners' type of markings, are in any event merely advisory and cannot bar the Commission from issuing an order in the public interest to prevent illegal practices, even where it is clear that the rules have been followed. *American Life and Accident Insurance Co.* v. *Federal Trade Commission*, 255 F. 2d 289, 292 (C.A. 8), certiorari denied, 358 U.S. 875; *Standard Distributors, Inc.* v. *Federal Trade Commission*, 211 F. 2d 7, 13 (C.A. 2). See also *Northern Feather Works, Inc.* v. *Federal Trade Commission*, 234 F. 2d 335, 338 (C.A. 3); *Book-of-the-Month Club* v. *Federal Trade Commission*, 202 F. 2d 486, 489 (C.A. 2).

3. Finally, petitioners argue that the Commission failed to follow a prior administrative ruling dismissing without prejudice a similar complaint against another watchcase manufacturer. But the Commission gave full consideration (J.A. 102-103) to its previous action, which was based not only on different

facts but on an insufficiency in the complaint not present here. In any event, "[a]n administrative agency, charged with the protection of the public interest, is certainly not precluded from taking appropriate action to that end because of mistaken action on its part in the past." *National Labor Relations Board* v. *Baltimore Transit Co.*, 140 F. 2d 51, 54-55 (C.A. 4), certiorari denied, 321 U.S. 795. See also *Federal Communications Commission* v. *WOKO, Inc.*, 329 U.S. 223, 227-228; *Niagara Falls Power Co.* v. *Federal Power Commission*, 137 F. 2d 787, 792 (C.A. 2), certiorari denied, 320 U.S. 792.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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FEBRUARY 1961.

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